

EL Zein (Migration) [2021] AATA 3791 (29 September 2021)

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- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Tarek EL Zein
VISA APPLICANT:	Master Hassan El Zein
CASE NUMBER:	2018337
HOME AFFAIRS REFERENCE(S):	2019002225
MEMBER:	Andrew George
DATE:	29 September 2021
PLACE OF DECISION:	Darwin
DECISION:	The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 101 (Child) visa: • Public Interest Criterion 4020 for the purposes of cl 101.223(a) of Schedule 2 to the Regulations.

Statement made on 29 September 2021 at 5:21pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 101 (Child) – bogus document or false or misleading information – divorce certificate and guardianship document from sharia court stating mother’s waiver of rights of guardianship – family census showing continuing marriage – disordered oral and documentary evidence – standard of proof to make adverse finding – document possibly infected by error or omission, but no satisfaction that it is false or misleading – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 101.223(a), Schedule 4, criterion 4020(1), (3), (5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 2 December 2020 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 24 May 2019. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 101.223(a) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) as the delegate found that the applicant had given, or caused to be given, “a bogus guardianship document”. Due to the complexity of the material, the delegate’s decision is quoted at length:¹
 5. *“In this application, the clients provided a genuine Lebanese divorce certificate showing that the applicant’s father and sponsor Mr Tarek El Zein divorced the applicant’s mother Ms Lucian El Zein on 14 April 2005.*
 6. *The clients also provided a letter from the Jaafari Sharia Court of Saida issued on 08 July 2019. The letter states that, based on the provision of a declaration by Ms Lucian El Zein, a copy of the divorce certificate and a personal extract document, the court decided to confirm the waiver of Ms El Zein’s rights of guardianship over the applicant. The effect of this letter is such that the applicant becomes under the sole guardianship of his father Mr Tarek El Zein.*
 7. *However, submitted with this application is a family census issued on 15 February 2019 showing that the applicant’s father Mr Tarek El Zein remains married to the mother Ms Lucian El Zein. This demonstrates that the court document obtained to seek guardianship of the applicant was provided only on the basis of false information. This guardianship document was then provided to the Department on 25 July 2019.*
 8. *Based on the evidence and information before me, I therefore find that the applicant has given or caused to be given a bogus guardianship document. Given this, the applicant fails to meet PIC 4020(1).”*
9. The Tribunal notes that it spent several hours sifting through the Departmental File to locate the relevant documents cited in the paragraphs above. Unfortunately, despite the file being relatively small, it was in no logical order.
10. The review applicant appeared before the Tribunal on 9 September 2021 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 101.223(a) for the grant of the visa. Broadly speaking, this requires that:

¹Decision Record/7.

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The substance of this matter is whether the 'Guardianship waiver' issued by The Jaafari Sharia Court of Saida on 8 July 2019 is a 'bogus document'. Given the status of the 'Guardianship waiver', the Tribunal is mindful of the Briginshaw principle in relation to the standard of proof required to make an adverse finding that it is 'bogus'.
18. The Tribunal has viewed the documents referred to by the delegate. The Tribunal has also heard from the applicant. Although the Tribunal does not make a credibility finding against the applicant, the Tribunal nevertheless indicates that the applicant's evidence was so

disordered that it did not assist him. For example, the applicant did not seem to be able to say when he was variously married and divorced.

19. The cause for the applicant's disordered evidence is unknown to the Tribunal. It may be, as the applicant said, due to a lack of education. At times, nerves can get the better of a witness. Occasionally, witnesses cloud Tribunal inquiries with irrelevance.
20. There may be cause for the Department to closely scrutinise all documentary evidence that the applicant has placed before it for inconsistencies, including inconsistencies with the applicant's previous own visa applications. This particularly relates to the lawfulness of his various marriages and divorces. Such inquiry, however, falls outside the scope of this review.
21. It is plausible that the 'Guardianship waiver' issued by The Jaafari Sharia Court of Saida on 8 July 2019 was infected by error or omission, but this does automatically not mean that document is 'bogus'. Applying Briginshaw, and on the evidence before it, the Tribunal is not satisfied that the 'Guardianship waiver' was obtained because of a false or misleading statement. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

22. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
23. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1). Therefore, PIC 4020(2) does not apply.

Has the applicant satisfied the identity requirements?

24. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. From passport and national police material on the Departmental File, the Tribunal is satisfied of the applicants' identities and they therefore meet PIC 4020(2A).

Has a visa previously been refused based on a failure to satisfy PIC 4020(2A)?

25. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
26. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A). Therefore PIC 4020(2B) does not apply.
27. Based on the above, the applicant does satisfy PIC 4020 for the purposes of cl 101.223(a).

DECISION

28. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 101 (Child) visa:

- Public Interest Criterion 4020 for the purposes of cl 101.223(a) of Schedule 2 to the Regulations

Andrew George
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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